No. 89-1332

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

GENE MCNARY, Commissioner of Immigration And Naturalization, et al.,

Petitioners,

vs.

HAITIAN REFUGEE CENTER, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

State of California; City of Los Angeles, California; Los Angeles Unified School District; Dade County, Florida; City of Miami, Florida

BRIEF FOR AMICI CURIAE

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INTEREST OF AMICI

The State of California, the Metropolitan Dade County, Florida, the City of Miami, Florida, the City of Los Angeles, California, and the Los Angeles Unified School District, California, present this brief as Amici Curiae in support of Respondents, and respectfully request the Court to affirm the decision of the Court of Appeals for the Eleventh Circuit. That court correctly held that the district court had jurisdiction under 28 U.S.C. section 1331(a) to consider plaintiffs' challenge to unconstitutional patterns and practices employed by the Immigration and Naturalization Service ("INS") in its administration of the Special Agricultural Worker ("SAW") Program created by the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 7, 8, 26, 42 and 50 U.S.C.).

Congress created the SAW Program to grant residency to immigrant farmworkers who had performed seasonal agricultural services and who were otherwise admissible as immigrants. 8 U.S.C.S. § 1160 *et seq.* (Law. Co-op. 1987 & Supp. 1990).[1] An estimated 1.3 million SAW applications were filed nationally. United States General Accounting Office Report to Agency Officials, *Immigration Reform: Potential Impact on West Coast Farm Labor* 12 (Aug. 1989) [hereinafter, "GAO Report to Agency Officials"]. The majority of all SAW applicants — about 700,000 — reside in California. *The*

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[1]IRCA also provided for the "legalization" of undocumented aliens who had been continuously and unlawfully resident in the United States since a date prior to January 1, 1982. IRCA § 245A, 8 U.S.C.S. § 1255a (Law. Co-op. 1987 & Supp. 1990). This legalization program is referred to herein as the Section 245A Program.

President's Comprehensive Triennial Report on Immigration 17 (1989) [hereinafter, "President's Triennial Report"]; F. Bean, G. Vernez & C. Keely, *Opening and Closing the Doors: Evaluating Immigration Reform and Control* 68 (Rand Corp. & The Urban Institute 1989) [hereinafter, "Bean, Vernez & Keely"]. California is home to the majority of applicants for residence under both IRCA legalization programs, as shown in the following table of the five states with the largest share of legalization applicants:

State	Share of SAW Applicants	Share of All Legalization Applicants
California	55%	56%
Texas	8%	18%
New York	3%	7%
Illinois	less than 3%	7%
Florida	11%	3%

President's Triennial Report at 17-18.

Many Section 245A Program and SAW applications were filed in urban areas, with New York City and Los Angeles-Long Beach receiving the most applications. *Id.* The Miami-Hialeah area received 7.4 percent of the SAW applications filed, while Los Angeles-Long Beach was second with 5.1 percent. *Id.*

Prior to the enactment of IRCA, hundreds of thousands of undocumented aliens made their homes within the jurisdictions of the amici. These residents, within the legal and social limitations placed upon them, lived, worked, paid taxes, raised families, and generally formed a significant part of the temporary and permanent populations within the care of each amicus. With the passage of IRCA, the status of each and every undocumented person changed. Some, who are being "legalized," have been brought "out of the shadows" and into the light of the full protection of federal, state and local laws. Others, who have been found ineligible for legalization or have failed to apply, have been pushed further into the shadows, as IRCA limits their access to employment, public assistance and many government services.

The amici are faced with the task of integrating into local societies and economies both those newly legalized by IRCA and those further disadvantaged by it. This task presents tremendous opportunities for enabling newly legalized residents to participate fully in United States society for the first time. It also imposes tremendous costs, both of administration and of coping with the dislocation and disruption of the still-undocumented population in the post-IRCA era. The amici, therefore, have a strong interest in insuring that unconstitutional patterns and practices of the INS do not defeat IRCA's purpose of bringing all "documentable" residents into the light.

SUMMARY OF ARGUMENT

Adopting the INS's interpretation of federal question jurisdiction would have the effect of permitting the INS systematically to deny whole classes of SAW applicants the legal status Congress intended them to have, trapping these documentable workers permanently in the shadows, without any effective judicial review of the patterns and practices leading to wholesale denial of the constitutional rights of these applicants. The amici thus have a direct and substantial interest in the outcome of this case, in that reversal of the decision of the court of appeals would ultimately impose greater costs, both

economic and social, on the amici responsible for governing and protecting these disadvantaged, documentable residents.

The intent of Congress in creating the SAW Program was to legalize quickly the pre-existing large seasonal agricultural workforce in this country and to afford to these persons the full protections of federal, state and local laws. If district courts cannot review patterns and practices in INS's administration of the SAW Program, there will be no way to correct unconstitutional procedures resulting in the improper denial of large numbers of applications. As a result, countless eligible workers will be trapped, perhaps permanently, in the "shadow population" of undocumented workers Congress intended to eliminate.

Adding eligible SAW applicants to the population of undocumented persons imposes social and economic costs on state and local governments. SAW applicants generally live on the margin of economic self-sufficiency. IRCA made illegal the hiring or harboring of undocumented workers, including "documentable" workers whose legalization applications have been denied improperly, and enforcement of IRCA's employer sanctions provisions has eliminated or greatly reduced the availability of any employment for these workers. These workers therefore are cast improperly among those subject to still greater exploitation than existed prior to IRCA's enactment. Fear of deportation prevents them, along with other undocumented persons, from calling on public agencies for assistance in dealing with exploitation in employment. This same fear prevents them, along with other undocumented persons, from cooperating with local law enforcement efforts and from seeking needed health care and social services. State and local governments are charged with protecting the health and welfare

of all residents. Improperly relegating eligible SAW applicants to a fearful, exploited underclass, afraid to report abuse and unwilling to seek help, makes this already difficult task nearly impossible.

State and local governments also lose funding when eligible workers are trapped in the shadows. IRCA creates short-term funding, the "State Legalization Impact Assistance Grants" ("SLIAG"), to be used to reimburse state and local governments and other participating agencies a portion of the substantial costs of the legalization programs. Wrongful denial of SAW applications reduces the amount of reimbursement to states in which the SAWs reside, and delay in correcting the patterns and practices leading to the denials may delay legalization of these persons until after the SLIAG funding has run out.

Another way state and local governments lose money when eligible workers are left undocumented is that such persons tend to be missed in the decennial census, on which depends funding under numerous federal assistance programs, as well as representation in Congress. In addition, governments at all levels lose tax revenues when eligible workers are denied legal status and legal employment and must seek jobs in the "underground economy," where wages are low and money is paid under the table.

IRCA not only undermines the economic condition of workers wrongfully denied SAW status, but also cuts off the availability of federal assistance to them. State and local governments must shoulder the increasing costs of providing these residents a "safety net" of assistance.

In some state and local governments have a direct interest in the proper administration of the IRCA legalization programs, and will be injured if the review theory proposed by the INS is adopted, not only because

the social and economic costs of unconstitutional denials of legalization applications will fall upon them, but because state and local governments, like the organizational Respondents herein, will be denied a forum in which to protect their own interests.

ARGUMENT

I

THE INS'S JURISDICTIONAL THEORY WOULD DENY STATE AND LOCAL GOVERNMENTS, AS WELL AS DOCUMENTABLE WORKERS, ANY FORUM FOR PROTECTING THEIR INTERESTS IN THE PROPER ADMINISTRATION OF THE SAW PROGRAM

A. District Court Jurisdiction Provides State and Local Governments Their Only Forum for Raising Relevant Issues Concerning The INS's Improper Practices

Petitioners argue that not only classes of individual SAW applicants, but also the organizational Respondents, the Haitian Refugee Center ("HRC") and Migration and Refugee Services ("MRS"), are precluded by section 1160(e) from raising constitutional challenges to the patterns and practices of the INS in administering the SAW program. Brief for Petitioner at 23-26. As amply demonstrated in the Brief for Respondents at 41-48, neither the language of IRCA nor its legislative history indicates any intention on the part of Congress to preclude judicial review of INS practices at the behest of these organizations.

It is important to state and local governments that the ruling of the court of appeals rejecting the INS's argument as to the organizational Respondents be affirmed. State and local governments have even greater interests in the proper administration of the SAW

program than the organizational Respondents herein. To a greater extent than Qualified Designated Entities like MRS, state and local governments are charged by IRCA with responsibility to administer the legalization programs and provide the services needed by legalizing residents. State and local governments suffer economic and social injury when applicants are systematically denied lawful status due to constitutional abuses in the application process. Moreover, state and local governments lose SLIAG allocations when applications of their residents are improperly denied, as well as general federal funding when documentable persons are erroneously forced back into the "shadow population" overlooked in the census.

State and local governments, as well as other parties with standing, must be permitted to seek redress for these and other injuries arising from the INS's administration of IRCA. *Cf. Perales v. Meese*, 685 F. Supp. 52 (S.D.N.Y.), *aff'd*, 847 F.2d 55 (2d Cir. 1988) (class action challenge to INS definition of "public charge" exclusion under IRCA § 201, 8 U.S.C.S. § 1255a(d)(2)(B)(ii) brought by Commissioner of New York State Department of Social Services); *City of New York v. Meese*, No. 88-Civ. 1570 (S.D.N.Y. 1988) (class action challenging related public assistance definition, suspended after INS issued a memorandum changing a related public assistance definition). Adoption of INS's unsupported reading of section 1160(e) to bar completely all constitutional challenges to its practices in connection with the SAW program except through the wholly inadequate vehicle of individuals' appeals of final orders of deportation, would severely restrict state and local governments' ability to protect their own interests and those of their populations.

B. The INS's Review Theory Permanently Traps Documentable Workers in the Shadow Population and Denies Them Judicial Review

The district court found that the INS systematically employed unconstitutional practices in handling SAW applications, denying applicants the ability to present and defend their applications, and resulting in potentially large numbers of documentable workers being denied legalization. Conceding here the validity of that finding, the INS nevertheless argues that no court can review and correct these practices until an individual applicant has been denied SAW status, has subsequently been apprehended by the INS, has been placed in deportation proceedings and ordered deported, and has appealed the order unsuccessfully to the Board of Immigration Appeals. Brief for Petitioner at 9, 11. The INS's position is that only then, in the context of an individualized appeal of a final order of deportation to the court of appeals, can the constitutional challenges to the patterns and practices that led to the initial denial of the SAW application be raised.[2]

The INS's review theory is even more implausible than appears upon its face: in fact, it is unlikely that any particular applicant denied SAW status will *ever* be placed in deportation proceedings. There is more than adequate support for the concern that denied applicants are trapped permanently in the shadow population of undocumented persons. The population of undocumented persons in the United States, even after legalization, is estimated to be between two and four million, *see*

[2]Indeed, given the abuses alleged in this case, the court of appeals could do little for the individual but remand the case to the Legalization Office with instructions to create a reviewable record and start the process again.

G. Borjas, *Friends or Strangers: The Impact of Immigrants on the U.S. Economy* 65 (1990) [hereinafter, "*Friends or Strangers*"] (3 to 4 million); President's Triennial Report at 29 (1.8 to 3.1 million), while the number of deportable persons apprehended by INS investigation units in 1988 was only 37,000. Bean, Vernez & Keely at 38, Table 4.2.[3]

Moreover, in enacting IRCA, Congress recognized the impossibility of deporting the huge numbers of undocumented persons already residing in the United States, and determined to concentrate its apprehension on new flows of immigrants, H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, 49, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5653. IRCA itself prohibits the use of any information about undocumented persons obtained in the legalization process in any enforcement proceeding. 8 U.S.C.S. § 1255a(c)(3)-(5). INS enforcement activities have changed accordingly. Even undocumented workers caught in employer investigations are not necessarily placed in deportation proceedings. One senior District official in Chicago reported that aliens found in the workplace were neither apprehended nor removed — the employer was simply expected to fire them before the next inspection. M. Fix & P. Hill, *Enforcing Employer Sanctions: Challenges and Strategies* 104 (Rand Corp. & The Urban Institute 1990) [hereinafter, "Fix & Hill"]. As a practical matter, many deportable aliens are offered, and accept, voluntary departure

[3]It should be noted that this figure does not reflect the significant number of individuals apprehended at the borders. Bean, Vernez & Keely at 38, Table 4.2. (Table separately lists number of apprehensions made by INS's Border Patrol and Investigations units). For purposes of the instant case, however, border statistics are not relevant in that they reflect persons who have not yet settled in this country.

when apprehended and are not placed in deportation proceedings at all. *See id.*

Even if a denied applicant is later apprehended by the INS, the decision whether to begin deportation proceedings and, perhaps, trigger eventual judicial review of its own patterns and practices, lies with the INS itself. Congress could not have intended that, by choosing not to initiate deportation proceedings against individuals alleging widespread unconstitutional practices, the INS itself could preclude any judicial review of those practices.

Thus, very few, if any, documentable workers denied legalization due to unconstitutional patterns or practices of the INS will ever be able to challenge these practices, obtain relief, and bring themselves within the full protection of "all applicable federal, state and local laws." Even if the INS happens to issue a final order of deportation triggering review and, ultimately, correction of its constitutional abuses, such an appellate opinion will little benefit the hundreds of thousands of applicants who will have been adjudicated in the interim under the faulty procedures.

For all practical purposes, documentable workers trapped in the "shadow population" as the result of systematic constitutional violations by the INS have no way out unless INS practices and procedures can be challenged in district court so that fair procedures can be mandated for all applicants. The perpetuation of this shadow population by means of the very programs meant to eliminate it imposes huge social and economic costs on state and local governments.

II

THE ABILITY OF DISTRICT COURTS TO CORRECT PATTERNS OF SYSTEMATIC CONSTITUTIONAL ABUSES BY THE INS FURTHERS THE INTENT OF CONGRESS TO LEGALIZE FARMWORKERS AND AFFORD THEM THE PROTECTION OF LAW AS QUICKLY AS POSSIBLE

The intent of Congress in enacting the SAW Program was to address the concerns of agricultural employers, who feared that the effect of IRCA's employer sanctions would be to remove large numbers of undocumented laborers from the agricultural work force, by creating an agricultural workforce protected "to the fullest extent of all applicable federal, state and local laws." H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, 83-84, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5687-88. In creating the SAW Program, "the [House] Committee [on the Judiciary] was ever mindful of the reports of abuses that occurred during the old Bracero program (P.L. 82-72) and had no intention of creating an environment conducive to the violation of worker rights." *Id.* at 5687. In order to serve the needs of both the growers and the agricultural work force, Congress streamlined the legalization requirements for seasonal agricultural workers, requiring a briefer residence in the United States, a lesser burden of documentation of eligibility and fewer restrictions on access to public services than were imposed on applicants under the Section 245A Program.

In arguing that IRCA precludes judicial review of systematic constitutional abuses in the INS's implementation of the SAW Program, Petitioners ride roughshod over Congress's intent in creating the SAW Program. The INS does not contest the finding that its practices were improper. The substance of the INS's argument is

that it may deny "documentable" workers the legalized status due them, then delay or prevent altogether review of the unconstitutional patterns and practices consigning these workers to the underground economy. Adoption of the INS's position would wreak untold injury on individual documentable workers; it would also impose tremendous losses and burdens on state and local governments.

III

TRAPPING DOCUMENTABLE WORKERS IN THE SHADOW POPULATION IMPAIRS THE ABILITY OF STATE AND LOCAL GOVERNMENTS TO PROTECT THE WELFARE OF ALL PERSONS RESIDING IN THEIR JURISDICTIONS, REGARDLESS OF LEGAL STATUS

The rejection of general federal jurisdiction in the district courts to correct patterns of unconstitutional practices would unreasonably—and in contravention of one of IRCA's principal purposes—delay the elimination of the vulnerable status of entire categories of previously undocumented persons whom Congress identified for legalization. These documentable individuals now find themselves improperly included in a shadow population of undocumented aliens who cannot or will not leave the country and who have been forced to labor in the underground economy without the benefits or protections of the law. SAW applicants, already among the poorest and most exploitable of workers, face dire consequences from denial of legal status.

More than half of all SAW applicants filed their applications in California. GAO Report to Agency Officials at 12. Surveys of these applicants reveal that SAWs are the poorest of the working poor. The median

annual income for rural SAW *families* was only $7,000 to $9,000. E. Kissam & J. Intili, *Legalized Farmworkers and Their Families: Program and Policy Implications* 22-23 (1989) [hereinafter, "Kissam & Intili"] (surveying SAW applicants in six rural California counties). Only families with more than two working wage earners were at all likely to be found above the poverty level. *Id.* SAW applicants who did not receive housing from their employers spent from one-third to nearly one-half of their total income on housing. *Id.* at 24.

Less than one-third of SAWs surveyed had any kind of health insurance. Comprehensive Adult Student Assessment System, *A Survey of Newly Legalized Persons in California* at 6-15 to 6-19 (1989). Over eighty percent of both SAW and Section 245A Program applicants were found to be illiterate or to lack minimal English language skills. *Id.* at 4-2. The average SAW applicant had less than six years of education. Kissam & Intili at ii-iii; J. Simon, *The Economic Consequences of Immigration* 289 (1989) [hereinafter, "Simon"] (the undocumented have on average less education and skills than the legal immigrant and native labor force).

Plainly, SAW applicants generally are a highly vulnerable population. When large numbers of SAW applicants are denied, without recourse, the legal status Congress intended them to have they lose both the protections of the laws and, perhaps, their already tenuous grip on economic self-sufficiency. State and local governments, meanwhile, must perform the difficult feat of protecting those individuals (and the rest of society) by enforcing criminal, employment and anti-discrimination laws and by reducing the incidence of homelessness and attrition from schools. This seemingly impossible task requires outreach to a people who are now more suspi-

cious of government agencies than ever before, and are afraid to assert what rights they may have.

A. IRCA's Employer Sanctions Undermine The Ability of Documentable Workers to Survive Without Government Assistance

Before November 6, 1986, employing undocumented workers did not violate federal law.[4] *See* Fix & Hill at 23-24. In enacting IRCA, Congress determined to discourage future illegal immigration by making it unlawful to hire "unauthorized aliens" as defined in the Act. 8 U.S.C.S. § 1324a(a) (Law. Co-op. 1987 & Supp. 1990). Cease and desist orders, civil money penalties, injunctions and criminal penalties, including imprisonment, are provided for employers engaging in a "pattern or practice" of knowingly hiring unauthorized aliens, 8 U.S.C.S. § 1324a(e)-(f), or harboring, shielding or concealing unauthorized aliens. 8 U.S.C.S. § 1324(a).[5]

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[4]Prior to IRCA, California, Connecticut, Delaware, Florida, Kansas, Maine, Massachusetts, Montana, New Hampshire, Vermont, and Virginia had laws outlawing employment of undocumented workers. However, unlike IRCA, studies indicate that these laws were not aggressively enforced. Bean, Vernez & Keely at 47-48.

[5]Full enforcement of IRCA's employer sanctions provisions began May 31, 1988 for most employers, and December 1, 1988 for employers of seasonal agricultural workers. 8 U.S.C.S. § 1324a(i). Unauthorized aliens employed on the date of enactment of IRCA could remain employed in the same job without risking imposition of sanctions on their employers, but could not legally be hired for new jobs. Pub. L. 99-603 § 101(a)(2), 100 Stat. 3360, codified at 8 U.S.C.S. § 1324a (note). For a report on the effectiveness of employer sanctions, see United States General Accounting Office, *Report to the Congress, Immigration Reform: Employer Sanctions and the Question of Discrimination* (Mar. 1990). In Los Angeles, the INS District Investigations staff grew from 35 in 1985 to 152 in 1989; (continued...)

Otherwise documentable residents who have been denied SAW status improperly by reason of unconstitutional INS procedures are relegated to the class of "unauthorized aliens" despite Congressional intent to the contrary.

The GAO in its 1990 Report to Congress stated that "[n]early all evidence suggests that IRCA has reduced illegal . . . employment." United States General Accounting Office, *Report to Congress, Immigration Reform: Employer Sanctions and the Question of Discrimination* (Mar. 1990) at 102. Of 864 unauthorized aliens apprehended at work during August and September, 1989, 135 reported that they had been refused employment elsewhere because they could not document their authorization to work, and 80 of these stated they had been denied employment for this reason on more than one occasion. *Id.* at 103. The number of arrests of illegally employed aliens, adjusted for level of enforcement (that is, per investigator hour), has declined 59% since IRCA's passage. *Id.* at 107. Arrests of visa violators, typically persons who were admitted to the United States as visitors who have been caught working illegally, are down 21% from the 6-month period ending September, 1986. *Id.* at 108-09. These trends indicate that IRCA's employer sanctions provisions are, in fact, reducing employment opportunities for undocumented workers in the general labor market (including those

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[5](...continued)
46% of this staff is devoted to enforcement of employer sanctions. Fix & Hill at 89. Officials at the Los Angeles District Office report enforcement of employer sanctions as their top priority. *Id.* at 95. In the Chicago District Office, INS investigations staff grew from 47 to 86 in the same period; 35 of the 86 investigators (41%) enforce employer sanctions. *Id.* at 89-90. Enforcement of sanctions is reported to be the first priority of the Chicago office. *Id.* at 95.

improperly denied work authorization), and driving them into the underground economy.

Even before the enactment of IRCA, when employment of undocumented workers was legal, such workers were subject to abuse and exploitation which pushed these workers further from economic self-sufficiency and, therefore, closer to reliance on public assistance for survival. Representative Rodino described the plight of the undocumented worker: "[U]ndocumented persons must keep all contacts with governmental authorities to an absolute minimum . . . . When their employer short changes them or doesn't pay them for overtime, or pays them less than minimum wage, they will complain to no one." 132 Cong. Rec. H9709 (daily ed. Oct. 9, 1986) (statement of Rep. Rodino).[6]

It is too soon to measure the effect of IRCA on employment abuses, but most observers believe exploitation of undocumented workers (including those improperly denied legalization) will only increase, and anecdotal evidence already suggests this is the case. *See, e.g.*, Hispanic Development Council of United Way & Orange

[6]Congress heard substantial evidence of such pre-IRCA exploitation. *See, e.g., Immigration Control and Legalization Amendments: Hearings on H.R. 3080 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 64 (1985) (testimony of Thomas R. Donahue, Secretary-Treasurer, AFL-CIO), 76 (statement of Archbishop (then Bishop) Anthony J. Bevilacqua), 93 (statement of Dale De Haan, Director, Church of World Service); H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 47 *reprinted in* 19[illegible] U.S. Code Cong. & Admin. News 5651 (testimony to the Immigration Subcommittee on September 9, 1985 by Althea Simmons, Director, Washington Bureau, NAACP) ("The worker is consciously aware that he/she has no protection because of illegal status and will accept 'starvation' wages to be employed in the United States.").

County Human Relations Commission, *Impact of Immigration Reform and Control Act: The Orange County Experience* 29 (July 1989) [hereinafter "Orange County Report"] (testimony of Robert Balgenorth, Executive Secretary Building & Construction Trade Council, AFL-CIO, noting that "[t]he undocumented will be more vulnerable then ever. The contractor who hires the undocumented workers knows that the worker has nowhere to turn if the contractor does not pay the agreed upon wage"); *id.* at 7 (noting that undocumented workers constitute most of the "day laborers," those who seek daily employment on city street corners, and suffer some of the most abusive labor practices); *id.* at 22 (testimony of Linda Wong, Executive Director of California Tomorrow, noting an increase in minimum wage, health and safety violations against people who remained undocumented after IRCA).[7] By limiting the undocumented workers' employment opportunities to those employers willing to hire them in violation of the law, IRCA has increased the likelihood that these workers will be exploited with low wages, poor working conditions and other abuses.[8]

[7]*See also* Tobar, *Immigration Reform Backfires: No Rights for Migrant Workers*, The Nation, Sept. 19, 1988, at 196 (IRCA, by producing a desperate class of workers willing to accept increasingly substandard wages and working conditions, has created new incentives for employers to hire undocumented workers); Corchado & Solis, *Immigration Law Creates a Subclass of Illegals Bound to Their Bosses and Vulnerable to Abuses*, Wall St. J., Sept. 2, 1987, at 44, col. 1 (immigrants present in United States at the time of IRCA's passage who do not qualify for legalization face depressed wages and substandard working conditions).

[8]Brown, *Economic Serfdom*, 32 Boston Bar J., Mar./Apr. 1988, at 14 ("There are reliable reports that many forms of enslavement

(continued...)

If the INS is permitted to systematically deny SAW applications proper consideration, without any effective judicial review and correction of unconstitutional patterns and practices, the documentable workers will be consigned to the "underground economy" of employers willing to hire them in violation of the law and will suffer the increased abuses characteristic of this sort of employment. Not only the undocumented, but also society at large suffers when these abuses are permitted to continue.

B. Persons Wrongly Denied Legalization Neither Assist State and Local Governments Nor Seek Needed Assistance For Themselves Due to Fear of Deportation

One of the reasons employment abuses — including abuses of improperly denied legalization applicants — are so difficult for state and local governments to root out is that undocumented workers are afraid to report such abuses, not only for fear of losing necessary and, perhaps, irreplaceable jobs, but also for fear that their undocumented status will be detected and they will be deported. This is not a phenomenon limited to employment abuses. Studies prepared for the Select Commission on Immigration and Refugee Policy suggest that fear of deportation prevents most undocumented

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[8](...continued)
are beginning to proliferate. In one case, a disguised headhunter confessed that for many months prior to adoption of [IRCA], he obtained a $100 fee for each illegal alien he succeeded in bringing to employers. The latter were able to pay him for obtaining such [exempt alien] prizes."); New York State Inter-Agency Task Force on Immigration Affairs, *The Immigration Reform & Control Act of 1986: New York's Response* 7 (Mar. 1987) (citing as an example one employer who extorted a $500 cash bond from an undocumented alien employee, plus longer hours of work at less pay).

people from approaching any public agency or making use of social services. *See Immigration Reform and Control Act of 1983: Hearings before the Subcomm. on Immigration, Refugees and International Law, House Comm. on the Judiciary*, Mar. 1, 2, 9, 10, 14, 16, 1983, 98th Cong., 1st Sess., 1400 (1983) (American Civil Liberties Union, "Civil Liberties and the Undocumented Alien: The Case for Legalization," Memorandum to House Judiciary Comm. (Mar. 16, 1983)); *see also* H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 4, at 6-7 *reprinted in* 1986 U.S. Code Cong. & Admin. News 5817-18; Simon at 289 (low use of public services by undocumented explained in part by fear of apprehension).

There are notable differences between documented and undocumented families. The former "appear to seek employment openly, and to ask for services that may be available to them. The families that are here illegally are basically families that are in the underground economy with no recourse to redress in case of injustices." Orange County Report at 32 (comments of Meliton Lopez, Ph.D., Superintendent, Anaheim City Schools). "The children of the undocumented tend to be passive and non-participatory while the other children tend to feel good about themselves and there is a willingness to risk." *Id.*[9]

During the final Senate debate on IRCA, Alan Simpson, the bill's co-author, described the illegal population as a "subculture of human beings who are afraid to go to the cops, afraid to go to a hospital, afraid to go to their employer who says 'one peep out of you, buster,

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[9]Many of these children, though suffering the consequences of their parents' undocumented status, are themselves legal residents or citizens of the United States. Wrongful denials of their parents' applications for legalization are particularly unfair to these children.

and you are down the road.' " 132 Cong. Rec. S16,880 (Daily ed. Oct. 17, 1986). State and local governments can neither eliminate abuses nor protect the health and welfare of the general population when a substantial number of persons are afraid to report problems or utilize services. Not only those improperly included among the undocumented, but society at large suffers from diminution of quality of life when they fear to avail themselves of protection. Moreover, exclusion of such persons from those who may openly and freely seek employment denies employers a portion of the legal workforce IRCA was intended to create and denies states and local jurisdictions a portion of the enhanced economic growth which IRCA promised.

The public safety of all residents is a primary concern of local law enforcement bodies, including police and fire departments. Many undocumented residents are unwilling to report crimes or to step forward as witnesses fearing that they will have to disclose their immigration status and, as a result, will be turned over to federal immigration officials for deportation. *See, e.g.*, Orange County Report at 9. "[C]ountless battered or abused undocumented women and children endure the horrors of domestic violence and social discrimination because they fear that calling the police would result in their deportation." Tamayo, *Defending the Rights of the Undocumented: A Challenge to the Civil Rights Movement and Local Governments*, 16 N.Y.U. Rev. L. & Soc. Change 145, 151, (1987-88) (citing D. Jang, Introductory Remarks at a Seminar on Domestic Violence and the Rights of Immigrants and Refugees, Golden Gate University (Sept. 8, 1986)).

Most undocumented workers, particularly denied SAW applicants, do not have private health insurance, and many are unable to afford to pay for medical

Rights of Immigrants and Refugees, Golden Gate University (Sept. 8, 1986)).

Most undocumented workers, particularly denied SAW applicants, do not have private health insurance, and many are unable to afford to pay for medical services because their incomes are below the poverty level. They are reluctant to avail themselves of public health services due to fear of detention and deportation.

> Living illegally in this country with the fear of being detained or deported, many undocumented aliens are unwilling to consult public clinics, and are unable, due to their inability to pay, to consult private physicians. They tend to work at low-paying agricultural or service sector jobs which rarely offer group health insurance coverage. Since many of them are not considered to be residing in the U.S. "under color of law," they are often ineligible for Medicaid and other publicly-financed health programs, even though many of them contribute to Federal, state, and local tax revenues. The fear of being apprehended, combined with the lack of health coverage and the inability to pay, combine effectively to deny poor undocumented aliens access to needed immunization services and primary care.
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> H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 4, at 7 *reprinted in* 1986 U.S. Code Cong. & Admin. News 5818.

In addition, the reluctance of undocumented individuals to seek early treatment of medical conditions often requires more expensive emergency services that could have been avoided. *See Immigration Control and Legalization Amendments: Hearings before the Subcomm. on Immigration, Refugees, and International Law, of the*

see also Office for Refugees and Immigrants for the Massachusetts Legislature, *Preliminary Report, Through the Golden Door: Impacts of Non-Citizen Residents on the Commonwealth*, 21-22 (May 16, 1990) (studies suggest new immigrants need to use more health services, especially to prevent long-term illness and complications at birth) [hereinafter, "Massachusetts Report"]. Accordingly, simple conditions requiring relatively small expenses become serious illnesses that adversely affect all taxpayers.

Congress also itself recognized that undocumented individuals' inabililty to obtain medical services jeopardizes not only the health status of these individuals and their children, but also undermines public efforts to control contagious diseases:

> It is evident to the Committee that the control of contagious disease is of importance not just to the undocumented alien population, but to the community at large. Infections do not recognize borders and do not discriminate on the basis of national origin. In the view of the Committee, there is a strong national public health interest in improving the accessibility of needed immunization and primary care services to this population, and particularly to those on whom the Congress chooses to confer legalized immigration status.

H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 4, at 7 *reprinted in* 1986 U.S. Code Cong. & Admin. News 5818; *see also Immigration Reform and Control Act of 1983: Hearings on H.R. 1510 before the Subcomm. on Health and the Environment of the House Energy and Commerce Comm.*, 98th Cong., 1st Sess., 107 (1983) (testimony of Martin D. Finn, M.D., Medical Director of Public Health Programs, Los Angeles County Department of Health Services) (stating that the benefits of health programs for

immigrants, especially child immunization services, "are for the entire community," and expressing concern about public health problems associated with infectious diseases such as tuberculosis, malaria and enteric diseases, which are common in certain immigrant populations); Massachusetts Report at 23 (Department of Public Health must work to prevent transmission of communicable diseases irrespective of a person's citizenship status).

IV

TRAPPING DOCUMENTABLE WORKERS IN THE SHADOW POPULATION REDUCES REVENUES OF STATE AND LOCAL GOVERNMENTS

A. States Lose Money Intended to Compensate for the Costs of Legalization When Workers Are Trapped in the Shadow Population

States and local governments have borne and will continue to bear substantial costs resulting from IRCA. See New York State Inter-Agency Task Force on Immigration Affairs, *The Immigration Reform & Control Act of 1986: New York's Response* 8-10 (Mar. 1987). Recognizing that legalization would impose heavy costs on state and local governments, Congress originally appropriated $1,000,000,000 per year, minus an offset for certain federal services provided, to fund State Legalization Impact-Assistance Grants. 8 U.S.C.S. § 1255a (note) (Supp. 1990) [hereinafter "SLIAG"]. SLIAG funds can be used to reimburse state and local agencies for certain costs of providing public assistance, educational services, and public health assistance to "eligible legalized aliens" ("ELAs"), and to pay administrative costs. This money is allocated among the states according to the number of ELAs in each state. SLIAG § b(1)(a). An ELA is an alien who has been granted lawful temporary resident status under either the Section 245A Program or the

(Supp. 1990) [hereinafter "SLIAG"]. SLIAG funds can be used to reimburse state and local agencies for certain costs of providing public assistance, educational services, and public health assistance to "eligible legalized aliens" ("ELAs"), and to pay administrative costs. This money is allocated among the states according to the number of ELAs in each state. SLIAG § b(1)(a). An ELA is an alien who has been granted lawful temporary resident status under either the Section 245A Program or the SAW Program. SLIAG § j(4). An eligible worker who has been denied SAW status as the result of unconstitutional practices of the INS does not count as an ELA for SLIAG purposes. Therefore, states where these documentable workers reside lose SLIAG reimbursement.

Adoption of the INS's review argument would delay the ultimate granting of ELA status to documentable SAW applicants, if this correction ever occurs, to a point in the future when SLIAG appropriations to fund further services to them will have run out. SLIAG originally was funded only through fiscal 1991 (the initial funding level has now been stretched out to include funding in 1992; the money may be spent through 1994), and appropriations already have been reduced for 1990. SLIAG § a(1)(B); *see* American Public Welfare Association, *Report from the States on the State Legalization Impact Assistance Grant Program*, Appendix D (May 1989); Inter Agency Task Force on Immigration Affairs Third Report, *Immigration in New York State: Impact and Issues* 11-14 (Feb. 1990) [hereinafter, "New York Third Report"]. By the time these documentable workers can be granted ELA status and "counted" for SLIAG funding, SLIAG is likely to be a memory.

census, the INS's jurisdictional theory would cost state and local governments federal funds and representation allocated by population. Federally funded programs dependent in whole or in part on a state's population as determined in the census include: Mental Health Services for the Homeless Block Grants, Executive Office of the President, Office of Management and Budget: *Catalog of Federal Domestic Assistance 1990*, at 224; Community Development Block Grants, *id.* at 530; Developmental Disability Grants, *id.* at 343, Nutrition Programs for the Aging, *id.* at 347; Adult Education—State Administered Grants, *id.* at 1015; and Migrant Education, *id.* at 1021.

C. Improper Denial of Legalization Applications Reduces Federal, State and Local Revenues

Tax and other revenues resulting from the employment of undocumented workers will decline as these workers are driven "underground" by IRCA's employer sanctions.[10] Governments at all levels lose revenue when

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[10]Most pre-IRCA studies of foreign-born residents in general, and undocumented workers in particular, concluded that federal, state and local tax revenues derived from this population exceeded the costs of any services provided them, although the costs were borne disproportionately by local governments, while the revenues flowed primarily to state and federal treasuries. *See* K. McCarthy & R. Burciaga Valdez, *Current and Future Effects of Mexican Immigration in California* 52 (Rand Corp. 1986); Undocumented Workers Policy Research Project Report, Lyndon B. Johnson School of Public Affairs Policy Research Project Report Number 60, *The Use of Public Services by Undocumented Aliens in Texas: A Study of State Costs and Revenues* 78-90 (1984); Memorandum from Los Angeles County Chief Administrative Officer Harry L. Hufford to Los Angeles County Board of Supervisors Re: Costs of Services to Undocumented Aliens (Apr. 14, 1982) (available from County of Los Angeles); *see also* Jensen, *Patterns of Immigration and Public*

(continued...)

workers who should be eligible for legalization under IRCA are driven into the underground economy. Wages of undocumented workers are more likely to be paid in cash, and employers are far less likely to withhold income taxes, or to remit them to the taxing governments. *See, e.g.*, B. Chiswick, *Illegal Aliens, Their Employment and Employers* 123 (1988); Undocumented Workers Policy Research Project Report, Lyndon B. Johnson School of Public Policy Research Project Report No. 60, *The Aliens in Texas: A Study of State Costs and Revenues* 85 (1984) [hereinafter "Texas Report"]. Wages are generally lower, reducing sales tax collections associated with consumption levels. *See id.* at 53; Note, *Compromising Immigration Reform: The Creation of a Vulnerable Subclass*, 98 Yale L.J. 409, 412 & n.19, 416, 421 & n.80 (1988); 132 Cong. Rec. H10,588 (Daily ed. Oct. 15, 1986). Workers lack benefits such as health insurance, and may thus be unable to pay for certain preventative, basic and emergency health services.

V

UNDER IRCA, STATE AND LOCAL GOVERNMENTS BEAR THE FISCAL BURDEN OF PROVIDING SERVICES TO PERSONS IMPROPERLY DENIED LEGALIZATION

It is one of the premises of IRCA, and demonstrably true, that the undocumented population will not

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[10](...continued)
Assistance Utilization, 1970-1980, 22 International Migration Review No. 1, at 51, 52 (1988) (citing studies). Immigrants generally have not been shown to consume public services at a greater rate than similarly situated native-born populations. Boyas & Tienda, *The Economic Consequences of Immigration*, 235 Science 645, 649 (Feb. 6, 1987); T. Muller & T. Espenshade, *The Fourth Wave, California's Newest Immigrants* 125-44 (1985).

"go home" despite the worsening economic conditions in which unauthorized aliens find themselves under IRCA. *See, e.g.*, Bean, Vernez & Keely at 72; *see also*, New York Third Report at viii, 5. This is true of persons with no reason to suppose they are eligible for legalization; it must be doubly so for persons whose SAW applications have been erroneously denied, and who know that they are, in fact, documentable. These persons will continue to need health care and social services, but the costs of these services, and of the difficult task of reaching out to this population to overcome the fear inhibiting use of such services, will be shifted increasingly to state and local governments as individuals become less able to pay for needed services and federal assistance to undocumented persons is cut off.

A. Improper Denial of Legalization Cuts Off Federal Assistance to Documentable Persons

In the past, verification of legal immigration status was not a pre-requisite for use of some federal welfare programs and benefits, including Aid to Families with Dependent Children ("AFDC"), food stamps, nutritional assistance for women and children ("WIC"), and Supplemental Security Income, although such programs were generally underutilized by undocumented persons in need of them. *See* Jensen, *Patterns of Immigration and Public Assistance Utilization 1970-1980*, 22 International Migration Review at 52 (1988); Texas Report at xxix, 39. IRCA amended numerous federally funded benefits programs to prohibit their use without verification of an applicant's immigration status. IRCA § 121, amending 42 U.S.C.S. § 1320b-7 (Law. Co-op. 1985 & Supp. 1990) (AFDC, Medicaid, Unemployment Compensation, Food Stamps) (undocumented pregnant women and persons faced with medical emergencies may receive assistance under Medicaid guidelines), and 20 U.S.C.S. § 1091 (Law.

Co-op. 1989 & Supp. 1990) (Student Loans, Grants, Work Assistance). In addition, it created a pilot computerized matching program, Systematic Alien Verification for Entitlements ("SAVE") designed to provide users with a way to check an applicant's eligibility for benefits. Thus, these essential programs have become unavailable to undocumented persons and, along with them, to documentable workers whose SAW applications have been wrongfully denied.

B. The Responsibility for Providing "Safety Net" Services Has Shifted to State and Local Governments

State and local governments have counteracted some of the restrictions placed on benefits to undocumented residents. In July, 1989, New York City proscribed discrimination based on immigration status in the areas of government services, employment, union membership, housing, public accommodations and lending. New York City Administrative Code § 8-17; *see* 3 Legalization Update, Issue 7, at 5 (Oct. 5, 1989). The City University of New York, Arizona State University, Texas state colleges and the University of Illinois at Chicago have explicitly stated that they will allow undocumented state residents to qualify for lower in-state tuition. *Id.*

In other cases, state and local governments do not have the option of refusing services to persons in need of them. This Court held in *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed.2d 786 (1982), that undocumented children cannot be denied access to public education. The cost of educating undocumented children in California was estimated at $2,164 annually per child in 1982, Memorandum from Los Angeles County Chief Administrative Officer Harry L. Hufford, to Los Angeles County Board of Supervisors: Costs of Services to Undocumented

Aliens, Attachment II (Apr. 14, 1982), and in Texas at $2,176 per child in 1982-1983, Texas Report at 67.

Seasonal agricultural workers and their families generally have little education, few skills and low incomes. *See Supra* Section II, pp. 11-12. When SAWs are wrongly denied legalization and prevented from working, therefore, it can be anticipated that these families will require assistance to survive.

Many states make various kinds of assistance available to all persons in need of them, regardless of immigration status, for humanitarian reasons and for the well-being of the state and local population and economy generally. For example, undocumented immigration status does not preclude an otherwise eligible resident of New York City from receiving or making use of WIC funds administered by the state of New York; various crisis and service centers operated by the New York City Human Resources Administration, including shelter care for the homeless; foster care, adoption services and preventive and protective services for children; Head Start programs administered by the New York City Housing Authority; various services provided by the New York City Department for the Aging; City University of New York admission and resident tuition rates; services of the New York City Housing Authority and Board of Education; public health services and city hospital facilities, and the services of the New York City Department of Mental Health Services. New York Department of City Planning, Office of Immigrant Affairs, *Immigrant Entitlements Made (Relatively) Simple: A Pamphlet for Agency Workers* (Jan. 1990).

Numerous states offer — and fund — assistance of various kinds to undocumented residents, including general assistance, medical care, emergency housing and relocation assistance, counseling, and assistance for the

elderly. *See* C. Wheeler, *Alien Eligibility for Public Benefits Part I*, Immigration Briefings, No. 88-11 (Nov. 1988). In addition, all residents, including undocumented aliens, make some use of public safety and fire protection (though undocumented workers may underutilize such services), public transportation, streets and sidewalks, public recreation facilities and other services provided by state and local governments.[11]

All of these services cost state and local governments money, and will cost more money as increasing numbers of undocumented workers are driven out of the legitimate employment market by employer sanctions. There is no reason to add to the burden on the states, counties and cities by adding to this population countless persons wrongly denied both legal status and the benefit of the Constitution by INS patterns and practices.

CONCLUSION

For the reasons set forth above, it is respectfully requested that the decision of the Court of Appeals for the Eleventh Circuit be affirmed.

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[11]Where state and local governments do not provide services to undocumented persons, private charities and volunteer agencies may step in and devote resources to the undocumented that could otherwise be spent on other persons in the community. *See* Orange County Report at 36 (discussing shift of community and charitable agencies from providing "quality of life" services to providing survival aid for persons denied employment and federal aid by IRCA). Private charities report that they are increasingly burdened as a result of IRCA. *See id.* Ultimately, persons who would have received assistance from these organizations may be forced back upon public assistance.

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